

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA, )  
 ) 8:07CR204  
Plaintiff, ) December 19, 2007  
 ) 9:05 a.m.  
vs. ) Omaha, Nebraska  
 )  
ERIC BAIRD, )  
 )  
Defendant. )

TRANSCRIPT OF SENTENCING PROCEEDINGS  
BEFORE THE HONORABLE JOSEPH F. BATAILLON  
UNITED STATES DISTRICT JUDGE

A-P-P-E-A-R-A-N-C-E-S

FOR THE PLAINTIFF: Michael P. Norris  
Assistant United States Attorney  
1620 Dodge Street  
Suite 1400  
Omaha, Nebraska 68102

FOR THE DEFENDANT: James E. Schaefer  
Shapiro & Schaefer  
1001 Farnam Street  
Third Floor  
Omaha, Nebraska 68102

COURT REPORTER: Allan G. Kuhlman  
Suite 3122  
111 South 18th Plaza  
Omaha, Nebraska 68102

Proceedings recorded by mechanical stenography, transcript  
produced with computer.

1 (At 9:05 a.m. on December 19, 2007, with counsel for  
2 the parties and the defendant present, the following  
3 proceedings were had:)

4 THE COURT: This is the case of United States of  
5 America versus Eric Baird, case number 8:07CR-204.

6 Would the attorneys please enter their appearance  
7 for the record?

8 MR. NORRIS: Good morning, Your Honor. For the  
9 United States, I'm Michael Norris.

10 MR. SCHAEFER: Good morning, Judge. Jim Schaefer  
11 appearing with the defendant.

12 THE COURT: Mr. Baird pled guilty to Count I of the  
13 information on June 14th charging him with possession of  
14 child pornography in violation of 18, United States Code,  
15 Section 2252 subparagraphs (a)(4)(B).

16 The court accepted the defendant's guilty plea and  
17 adjudges that the defendant is guilty of the offense charged  
18 in Count I of the information.

19 A presentence investigation report has been  
20 prepared.

21 I've also reviewed the plea agreement, and we've  
22 done a number of studies on Mr. Baird in the interim.

23 The court has reviewed the presentence investigation  
24 report.

25 I've also reviewed the plea agreement and the court

1 will accept the plea agreement.

2 With respect to the presentence investigation  
3 report, does the government accept and adopt the presentence  
4 report, Mr. Norris?

5 MR. NORRIS: Yes, Your Honor.

6 THE COURT: Mr. Schaefer, do you have any objections  
7 to the presentence investigation report?

8 MR. SCHAEFER: I had questions on a couple of the  
9 enhancements, Judge, that I don't think we resolved at the  
10 last hearing.

11 THE COURT: I think you're correct. So how do you  
12 want you to proceed? Do you want any additional evidence?

13 MR. SCHAEFER: There were two things. Paragraph 22  
14 and 23.

15 Paragraph 22 had to do with the five level  
16 enhancement for distribution for profit and I think the  
17 government submitted U.S. versus Griffin indicating it was  
18 their position this was a peer-to-peer system that was  
19 utilized by Mr. Baird.

20 That is just not the case. This wasn't a file  
21 sharing program he had like Kazaa. It was totally different.  
22 I think that's the evidence in the case file.

23 His folders were not available for downloading from  
24 anybody that was on the computer like a Kazaa user could do.

25 So I don't think the five level enhancement for

1 distribution is appropriate, Judge.

2 THE COURT: But he was able to, as I understand the  
3 evidence, your client was able to obtain pornography by  
4 accessing someone else's file server?

5 MR. SCHAEFER: Yes.

6 THE COURT: And then giving something, we're not  
7 sure what, in order to get something in return?

8 MR. SCHAEFER: Right.

9 THE COURT: But you don't think that applies under  
10 the five point enhancement?

11 MR. SCHAEFER: No.

12 THE COURT: Because he is not the one that had the  
13 peer-to-peer?

14 MR. SCHAEFER: Correct.

15 THE COURT: Mr. Norris?

16 MR. NORRIS: Your Honor, I think Griffin talks about  
17 peer-to-peer and Kazaa and LimeWire and BearShare and some of  
18 those cases.

19 This is an internet relay chat, which really serves  
20 the same purpose.

21 Basically, as it says in the search warrant, and as  
22 it says in the response by the probation office to the  
23 objections, according to the search warrant affidavit the  
24 file share server in Rankin, Illinois, had specific  
25 instructions which required the user to upload a certain

1 number of images of prepubescent children in exchange for  
2 being allowed to download images of child pornography.

3 So there is an exchange or bartering system going on  
4 that Griffin talked about, and that really in sum and  
5 substance is no different than being able to trade images as  
6 a result of Kazaa or LimeWire or some of these what are known  
7 as peer-to-peer networks.

8 It's the same thing. It's just, I won't say  
9 prehistoric, but a precursor to what happens later when the  
10 peer-to-peer networks become more popular.

11 THE COURT: We're using the 2006 sentencing?

12 MR. NORRIS: Yes.

13 THE COURT: I know the guidelines have some specific  
14 language in the notes concerning that. Mr. Schaefer?

15 MR. SCHAEFER: This program I think was designed for  
16 messaging here, Judge, but it does have more functionality  
17 built into it. It does allow what took place in this  
18 particular case.

19 With the instance messaging situation that we have  
20 here, it does come with the ability to share files, but it's  
21 different.

22 It's different in construction than I think what the  
23 government is trying to allege here for the five level  
24 increase.

25 It's widely used for instant communication, but the

1 ability to share files, as done here, is not the ability, or  
2 maybe the target I should say of what is indicated under 2G2.

3 I guess that's my position. There was certainly no  
4 intent by Mr. Baird to distribute anything in return for  
5 anything else.

6 THE COURT: But the government's affidavit says that  
7 he had to exchange, correct?

8 MR. SCHAEFER: Yes, and I know that's in the  
9 affidavit.

10 THE COURT: You disagree with the affidavit?

11 MR. SCHAEFER: Well, I guess I disagree with the  
12 fact that Eric had a file-sharing program in his computer.

13 THE COURT: And I don't know that anybody says that  
14 he does.

15 The question, though, is, did he have to exchange or  
16 barter one set of pornography for another in order to get the  
17 pornography that he has?

18 And the government's evidence is that he did. Do  
19 you have any evidence to the contrary?

20 MR. SCHAEFER: No, I don't.

21 THE COURT: But you believe that the enhancement  
22 applies only if your client has the peer-to-peer program, as  
23 opposed to going to another program that has the capability  
24 to barter?

25 MR. SCHAEFER: Yes.

1 THE COURT: And the government's position is it  
2 doesn't make any difference?

3 MR. NORRIS: The government's position is it's the  
4 exchange and a barter and I don't think the guideline is  
5 written in the context of a peer-to-peer program.

6 It's written in the context of an exchange or barter  
7 and Griffin expands it to include peer-to-peer programs.

8 Well, it doesn't expand it, but states that's what  
9 it's meant to address.

10 MR. SCHAEFER: Under the Griffin case the  
11 enhancement was applied because Griffin had that capability.

12 THE COURT: That would be the next step.

13 MR. SCHAEFER: Right.

14 THE COURT: But Mr. Norris' position is that the  
15 substance of the Griffin case is that someone had to exchange  
16 or barter, one way or another, whether it was on your  
17 computer program or not, that Griffin transcends that  
18 distinction, and your position is that it doesn't?

19 MR. SCHAEFER: Right. That's the issue there.

20 THE COURT: Mr. Schaefer, do you agree or disagree  
21 that in order to obtain the images that your client received  
22 -- well, do you agree or disagree with the government's  
23 affidavit that your client had to exchange prepubescent  
24 material in order to get prepubescent material?

25 MR. SCHAEFER: No, I don't agree with that.

1 THE COURT: Why not? What evidence do you have to  
2 that effect?

3 MR. SCHAEFER: Well --

4 THE COURT: Their affidavit says that that's what  
5 your client had to do.

6 MR. SCHAEFER: The peer-to-peer -- the software that  
7 is available, there is a difference being actively engaged or  
8 whether or not it's passing. In other words --

9 THE COURT: I understand that, but the government's  
10 affidavit says that your client had to exchange prepubescent  
11 pornography in order to get the prepubescent pornography that  
12 was provided on this server, correct?

13 MR. SCHAEFER: That's correct, and the reason I  
14 disagree with that is because that's never been produced.

15 THE COURT: What has never been produced?

16 MR. SCHAEFER: Whatever he exchanged.

17 THE COURT: But the government's affidavit says that  
18 that's what occurred, correct?

19 MR. SCHAEFER: I understand that.

20 THE COURT: Your position is until they produce it  
21 you don't believe it?

22 MR. SCHAEFER: Well, that's my position, yes.

23 THE COURT: And why is that?

24 MR. SCHAEFER: Well, I don't know. I've seen some  
25 of this material that the government alleged is kiddy porn.

1 THE COURT: I see, and you don't think it is?

2 MR. SCHAEFER: Some of is and some of it doesn't fit  
3 the definition.

4 MR. NORRIS: Your Honor, I would submit that -- I  
5 don't know that you have to exchange kiddy porn for kiddy  
6 porn.

7 I think you can exchange four images of adult  
8 pornography and receive forty-five image of child pornography  
9 and it still fits under this because it's a barter or trade  
10 situation with the child pornography going one way and the  
11 other the other way.

12 MR. SCHAEFER: I think Mr. Norris will agree with me  
13 that there was what we call regular porn or adult porn --

14 THE COURT: That was exchanged.

15 MR. SCHAEFER: Right.

16 THE COURT: And what the government wants me to  
17 do -- do you have the guidelines there in front of you  
18 Mr. Norris?

19 I think it's 2G2.2, subparagraph (b) subparagraph 3,  
20 subparagraph capital (B), distribution for the receipt or  
21 expectation of receipt of a thing of value, but not for  
22 pecuniary gain, increase by five levels.

23 MR. NORRIS: Right.

24 THE COURT: Anything further, Mr. Schaefer?

25 MR. SCHAEFER: One other on paragraph 23, Judge, the

1 two level enhancement that has been --

2 THE COURT: Oh, no, I just want to talk about this.

3 MR. SCHAEFER: No, nothing else on that, Judge.

4 THE COURT: I don't think I'm going to go further  
5 than the Griffin case.

6 Distribution for the receipt or expectation of  
7 receipt of a thing of value, but not for pecuniary gain,  
8 increase by five levels.

9 It seems to me that if Mr. Baird had a peer-to-peer  
10 program in his program, then this probably applies.

11 If he distributes images that are not unlawful, to  
12 obtain unlawful images, I'm not sure that you can call it a  
13 thing of value.

14 And so I think we are pushing the envelope on  
15 distribution under that circumstance, because he's not  
16 distributing anything illegal, and I don't know that you can  
17 say he's distributing anything that has value.

18 So I'm going to sustain the defendant's objection to  
19 paragraph 22.

20 MR. NORRIS: If you are sustaining the objection to  
21 paragraph 22, then there is still a two level enhancement  
22 under (b) (3) (B) as well or maybe (b) (3) (F).

23 THE COURT: It's (F), distribution other than  
24 distribution in provisions (A) though (E).

25 MR. NORRIS: I would submit that it's a two level

1 enhancement at least, as opposed to a five under your theory  
2 then.

3 THE COURT: Mr. Schaefer, your position on that?

4 MR. SCHAEFER: Doesn't distribution still have to be  
5 for some illegal purpose?

6 If I send out Martha Stewart recipes and get back  
7 something that is not legit, is that distribution described  
8 in (A)?

9 THE COURT: Mr. Norris, what are we distributing?  
10 Doesn't he have to distribute something illegal?

11 MR. NORRIS: No, of course not. All he has to do is  
12 exchange.

13 What he's doing is he's sending four images to get  
14 forty-five, but that's what he's exchanging, and that's the  
15 barter.

16 THE COURT: So he's distributing something, and as  
17 long as he's distributing something to get something, then  
18 you believe this guideline applies?

19 MR. NORRIS: And that's the value that I think  
20 applies the five level enhancement, but I'm not arguing that  
21 point any further, because you've decided.

22 But we are still to the point where you've got an  
23 exchange, and the exchange is I give you four images and --  
24 you give me four images and in return I will send you  
25 forty-five, some of which is going to be child pornography.

1 THE COURT: Mr. Schaefer?

2 MR. SCHAEFER: I think you've heard the argument,  
3 Judge. I just don't agree with the enhancement at all in  
4 this paragraph, paragraph 22.

5 THE COURT: This is clearly distribution.  
6 Distribution under the definition is, distribution means any  
7 act, including possession with intent to distribute,  
8 production, advertisement and transportation related to the  
9 transfer of material involving the sexual exploitation of a  
10 minor.

11 Distribution includes posting materials involving  
12 the sexual exploitation on a web site, but does not include  
13 the mere solicitation of such material by the defendant.

14 Maybe I'm wrong. If it doesn't include solicitation  
15 of such material by a defendant, then how is this  
16 distribution, Mr. Norris?

17 MR. NORRIS: He's trading and he's receiving in  
18 return and actually under the statute, if I had charged him  
19 with receipt, it would have been a prototypical receipt.

20 He's receiving something in return or he's just  
21 receiving something.

22 THE COURT: But if he solicits, how is that any  
23 different than asking for it with legal material?

24 MR. NORRIS: He is not asking for it with legal  
25 material.

1 THE COURT: He is asking for it with pornography,  
2 but there is nothing illegal about pornography unless it's  
3 prepubescent minors.

4 MR. NORRIS: Correct.

5 THE COURT: And you can't show that he used  
6 prepubescent minor material.

7 MR. NORRIS: Actually I think I can. May I have a  
8 minute to talk to my witnesses?

9 THE COURT: Yes, you may. Mr. Norris, I have to  
10 tell you, I thought this might run a little long.

11 I'm wondering if I can take a guilty plea and then  
12 we can come back and it will give you a chance to visit with  
13 your witness.

14 (9:25 a.m. - Recess Taken)

15 (At 9:50 a.m. on December 19, 2007, with counsel for  
16 the parties and the defendant present, the following  
17 proceedings were had:)

18 THE COURT: We're back on the record and,  
19 Mr. Norris, I asked you to further elaborate why the two  
20 point enhancement applies and not the five point enhancement  
21 and you may proceed.

22 MR. NORRIS: Your Honor, I would state the  
23 following:

24 As far as the two points, you've indicated that the  
25 problem that you have with the language on distribution is

1 that if you solicit, and merely solicit, then it may not  
2 apply.

3 And I don't take any umbrage with that, but what he  
4 did here was not merely solicit.

5 To me soliciting means asking for and then receiving  
6 and what he did here was he had to give four items of value  
7 in order to receive forty-six items of value.

8 So that takes it beyond the soliciting and it takes  
9 it into the bartering/exchanging for something other.

10 Now, if you go back into that commentary --

11 THE COURT: How is it distribution? That is the  
12 question. How is it distribution?

13 I'm trying to relate this in my mind with reality  
14 besides the computer reality.

15 If he distributes, that means he has to give  
16 something -- distribute something illegal to get something  
17 illegal, and then that makes him a distributor, as opposed to  
18 someone that merely possesses or purchases or receives.

19 So how is he a distributor if you can't show that he  
20 gave something illegal to get something illegal?

21 MR. NORRIS: Well, if I show that he gave something  
22 illegal to get something illegal, we are back at the five  
23 level, because that's what commentary says irregardless of  
24 peer-to-peer. It says you trade child porn for child porn,  
25 you're looking at five levels.

1 THE COURT: How do you have anything other than  
2 that? I know the guidelines say two point is for other  
3 distribution. How do we have distribution here?

4 MR. NORRIS: This is why we are agreeing to the two  
5 levels, and we are agreeing to the two levels because there  
6 are four items that are exchanged.

7 The agent has talked to the agent who was involved  
8 in this that took the server down.

9 Three of those items are clearly not going to be  
10 child pornography. We will tell you that right now.

11 They are photographs of either adult women, or they  
12 are photographs of undetectable age, and one is fully  
13 clothed, so we don't worry about that.

14 But there's a movie out there and the movie has the  
15 name of -- if I may have a second I'll put the name on the  
16 record -- but if that movie comes back as a child pornography  
17 movie, and the title is very suggestive of the fact it may  
18 have child pornography in it, then we go right to the five  
19 level.

20 I think the parties are willing to agree that it's a  
21 two level.

22 So it's a compromise and I'm willing to not appeal  
23 the determination on the five level and go with the two  
24 level, if that's what they are willing to do.

25 MR. SCHAEFER: We are willing to do that, Judge. We

1 don't recollect -- my initial comment to you was that we  
2 didn't think some of that material was illegal, and it turns  
3 out that three of the four weren't, but I don't know if and  
4 my client doesn't remember what the remainder is, and it  
5 could or couldn't be, so we're compromising this morning.

6 THE COURT: I always tell the parties to settle  
7 things. Apparently you've settled it, so I'll apply the two  
8 point enhancement.

9 And now you have another objection to one of the  
10 other paragraphs, is that correct, Mr. Schaefer?

11 MR. SCHAEFER: I do, Judge. Paragraph 23 assesses a  
12 two point enhancement for use of a computer to utilize these  
13 images for viewing.

14 And my contention is that the information recites  
15 that under 2256 that the images are transported in interstate  
16 commerce by means of using a computer.

17 So I think that two levels is included as the base  
18 offense level.

19 THE COURT: I wish you were right, Mr. Schaefer, but  
20 this enhancement has been in the guidelines since as far back  
21 as I can remember, and it seems as though it is double  
22 counting, but the scheme of the guidelines with respect to  
23 the base offense level and then any enhancement for the  
24 computer is the scheme and I think a correct read of the  
25 guidelines gets you to the two points for use of a computer.

1 So I am going to overrule your objection to that.

2 MR. SCHAEFER: Then we are ready to proceed to  
3 sentencing.

4 THE COURT: Mr. Baird, did you have an opportunity  
5 to review the presentence report yourself?

6 THE DEFENDANT: Yes, Your Honor, I did.

7 THE COURT: The base offense level is 18. Plus two  
8 for a minor under twelve.

9 Plus two for other distribution. Plus two for a  
10 computer being used and plus two for roughly 150 images, for  
11 a gross offense level of 26.

12 Minus three for acceptance of responsibility gives  
13 us a total offense level of 23.

14 Criminal History Category I. Sentencing ranges of  
15 imprisonment, 46 to 57 months. The supervised release range  
16 is five years.

17 The fine range, I believe, is ten thousand to one  
18 hundred thousand dollars, and a one hundred dollar special  
19 assessment.

20 All right. Mr. Schaefer, do you have a motion for  
21 downward departure?

22 MR. SCHAEFER: Yes.

23 THE COURT: You may proceed with respect to that.

24 MR. SCHAEFER: Yes. Before I get to that, did you  
25 receive the evaluation?

1 THE COURT: Yes.

2 MR. SCHAEFER: Will that be made part of the  
3 presentence?

4 THE COURT: We can if you want to.

5 MR. SCHAEFER: There is one correction.

6 THE COURT: You can make it an exhibit or you can  
7 just ask me to take notice of it. I would prefer we make it  
8 an exhibit and then I will seal the exhibit.

9 MR. SCHAEFER: Let's do that.

10 THE COURT: Do we have any other exhibits,  
11 Ms. Slagle, in this matter? Let's be safe and mark it as  
12 Exhibit 101.

13 MR. SCHAEFER: There's only one inaccuracy in that,  
14 Judge.

15 THE COURT: Does the government have any objection  
16 to Exhibit 101?

17 MR. NORRIS: No, Your Honor.

18 THE COURT: It's received and sealed. The  
19 inaccuracy is what?

20 MR. SCHAEFER: Under sexual assessment on the fourth  
21 page, very last sentence on that page, under sexual  
22 assessment, the very last sentence where it says he reports,  
23 the word, if we could strike out the word male, that is not  
24 correct. That has to be a typo.

25 THE COURT: I assume you have no idea one way or the

1 other on this, is that correct, Mr. Norris?

2 MR. NORRIS: I don't know, but I don't think it  
3 matters in the overall scheme of things, so I don't object if  
4 you strike it.

5 THE COURT: I would rather not strike it, but I  
6 would rather take your statement that it is inaccurate,  
7 unless you have the author here to tell me otherwise.

8 I'm willing to take into consideration your  
9 assertion that it is a typographical error or that it is in  
10 error.

11 I will agree with Mr. Norris that I don't know that  
12 it is of any moment as long as it doesn't have to do with  
13 minors.

14 Anything further? Any further evidence,  
15 Mr. Schaefer?

16 MR. SCHAEFER: No other evidence, Judge.

17 THE COURT: Any other evidence from the government?

18 MR. NORRIS: No, Your Honor.

19 THE COURT: You may argue your motion,  
20 Mr. Schaefer.

21 MR. SCHAEFER: I would like you to depart downward,  
22 Judge, from the level 23.

23 Mr. Baird has always been a law-abiding citizen. He  
24 was in the service of his country when this criminal activity  
25 was discovered.

1           He's a captain in the United States Air Force with  
2 no prior record.

3           I don't believe that this criminal activity really  
4 shows much evidence of any significant planning of any  
5 nature.

6           I hope the court is convinced that Eric is not  
7 dangerous at all to the community.

8           The information that has been developed should lead  
9 us to conclude that he's certainly not a pedophile.

10           He has been examined by a couple different agencies  
11 now and I hope that the court is comfortable with the fact  
12 that he does not suffer from any mental illness with regard  
13 to that.

14           Captain Baird, when he was discovered, when  
15 initially talked to by the agents of the United States Air  
16 Force, thought that the material that was contained on that  
17 CD had been destroyed.

18           He had cleaned out his computer before he went on  
19 active duty overseas and the criminal activity that was  
20 focused on here took place over a very short period of time  
21 some time ago.

22           THE COURT: What evidence is there of that?

23           MR. SCHAEFER: The computer was looked at and the  
24 hard drive was cleaned and what we had left was a CD that was  
25 burned and was discovered when the search warrant was served

1 on Mr. Baird's home.

2 But he has led a law-abiding life, Judge, a decent  
3 life. He has tremendous support in the community here.

4 He has good character references. His parents are  
5 here in the courtroom traveling from California I think for a  
6 second time here to show support.

7 Part of my motion for downward departure, I entitled  
8 it as a Scooter Libby motion.

9 The president of the United States pardoned Scooter  
10 Libby under similar circumstances, I think, because he had  
11 given and dedicated his adult life to the service of his  
12 country, just as Captain Baird did.

13 My client is now going to be saddled with a felony  
14 conviction. His military career is over with.

15 He's going to be registered as a sex offender for  
16 the next ten years, I think that's enough punishment.

17 In my opinion, Judge, he doesn't need to be  
18 incarcerated for 46 to 57 months.

19 I was going to suggest this morning that you reduce  
20 this to an offense level 10, give him a split sentence, and  
21 even an opportunity for probation.

22 I don't think that would be out of line with what he  
23 could have received or what he would have received here in  
24 the State of Nebraska had he been prosecuted a few blocks  
25 south of where we're at this morning.

1           There is no actual victim here. I understand that  
2           the government's position that there is always a victim when  
3           this type of activity is discovered, but even the presentence  
4           report indicates there is not really identifiable victims  
5           here currently.

6           So for all of those reasons, Judge, I would ask that  
7           you depart downward.

8           THE COURT: Mr. Norris?

9           MR. NORRIS: I can wrap it all up into allocution if  
10          you wish, if that was allocution, or I can just go on the  
11          downward departure, however you wish to proceed.

12          THE COURT: I think that Mr. Schaefer's motion for  
13          downward departure is in the nature of the heartland motion  
14          for downward departure, and it's not hard for the court to  
15          conflate the heartland departure with a statutory deviation  
16          as well, and I have to say that I'm inclined to do that, but  
17          not nearly as much as Mr. Schaefer wants me to.

18          But I think what we'll do is just move to allocution  
19          and the court's consideration with respect to the statutory  
20          sentencing as well as the guideline sentencing, and you've  
21          talked about the guidelines, Mr. Schaefer. Is there anything  
22          you wanted to add?

23          MR. SCHAEFER: No. My client did want to address  
24          you in allocution briefly.

25          THE COURT: Mr. Baird?

1 MR. SCHAEFER: Thank you, Your Honor for allowing me  
2 to speak. I wanted to take this moment to apologize to  
3 everybody in this room right now for the fact that we're  
4 here. It's my fault that we're here and nobody else's.

5 I wrestled with this for a long time about a victim  
6 and, you know, why everything was going the way it was going,  
7 I couldn't see a victim in the case, and the people that  
8 really suffered for this are the people sitting behind me,  
9 people who have traveled from California twice now and they  
10 shouldn't have to be going through that. I apologize to  
11 everybody here involved even at all.

12 I loved my life that I had before in the military,  
13 serving. I spent a long time wishing I could have it back  
14 and I know that's different now.

15 I know that I'm going to be paying for this for a  
16 long time.

17 I've lost my career. I've lost most of my military  
18 friends.

19 I'm losing my house because I can't pay for it, and  
20 I'm losing my freedom for a while.

21 I have been on ankle bracelet for six months now and  
22 I walked into Jim's office to start this over a year ago.

23 I am ready for this to be over. I'm ready to go on  
24 with my life however you see that fit, sir.

25 I would like to make you two promises. One is that

1 I will, regardless of what happens today, I will do  
2 everything in my power to lead a successful and normal life  
3 away from any of the stigma that go with being a registered  
4 sex offender or a felon.

5 The other one is from the therapist that you had me  
6 go to for the second evaluation and the promise is that you  
7 will never see me again.

8 I want to make that very clear. She gave me a low  
9 risk for re-offense and I promise you there will be no risk  
10 for re-offense.

11 I do not presume to know how to do your job or tell  
12 you how to do your job.

13 I will accept whatever sentence you give me and I  
14 will accept it graciously.

15 I'm thankful that we've even got enhancements taken  
16 off. Three points is three points and I'm thankful for that.

17 But regardless of what happens today, my life will  
18 go on and it will be okay and I accept whatever you have to  
19 say today.

20 If you have any questions you have of me, I'll  
21 answer them now. If not, thank you very much.

22 THE COURT: Thank you, sir. Mr. Norris?

23 MR. NORRIS: First of all, Mr. Baird was very  
24 cooperative right from the outset from the point in which the  
25 disks were taken.

1 I heard from Mr. Schaefer. There was really no  
2 arguing about what was done or anything other than the effect  
3 and the impact that this would have on his military career,  
4 and obviously there's not much we can do about that.

5 We could have charged this as a receipt, because  
6 even based on the search warrant it talked about how it came  
7 to him, in which case he would have been dealing with a five  
8 year mandatory minimum.

9 We opted not to do because of the cooperation he  
10 gave us and --

11 THE COURT: How would you have charged -- oh, under  
12 the new statute for receipt?

13 MR. NORRIS: Yes. If I had charged it with receipt  
14 because of what was sent to him from the server in Rankin,  
15 Illinois, he received it as soon as it comes to there.

16 Now, if we could have proved he received it in  
17 Nebraska and it was in a .com.cox.net, probably could have,  
18 if we had gone through that.

19 But the point is, we could have charged him with a  
20 five year mandatory minimum.

21 We didn't do that based upon his service to his  
22 country, based upon his cooperation, and based upon the fact  
23 that he would be coming before you and asking for a downward  
24 departure.

25 I don't think a downward departure -- we are

1 recommending the low end of the guideline range.

2 I don't know that a downward departure is  
3 inappropriate. I'll say that much.

4 But I will say that on the reasons that are  
5 proffered, they are not strong reasons in and of themselves.

6 His military service is something that can be  
7 considered, but again is it that much greater than anything  
8 else?

9 The fact he is going to get a higher sentence here  
10 than he would up the street cannot and should not be  
11 considered.

12 The fact of the report that is before you, that  
13 report is done to make sure that he's not a pedophile.

14 It's not like he gets bonus points for not being a  
15 pedophile; it's to make sure he doesn't injure, harm, or that  
16 we are not releasing somebody earlier or not putting the  
17 right restrictions on them.

18 So for those reasons, I anticipate that there will  
19 be a downward departure in this case, I'm asking that it be a  
20 reasonable downward departure, and by reasonable I'm  
21 suggesting that it be closer to the lower end of the  
22 guideline range than to probation. Thank you.

23 THE COURT: Is there any legal reason why the court  
24 should not proceed to sentencing at this time, Mr. Norris?

25 MR. NORRIS: No, sir.

1 THE COURT: Mr. Schaefer?

2 MR. SCHAEFER: No, Your Honor.

3 THE COURT: The first thing we have to say is who  
4 the victim is and the victims are the minors that are  
5 exploited in order to get these picture to begin with and  
6 those folks are the real victims in this case.

7 And I think that's why Congress enacted the laws  
8 that they've enacted and it's this court's responsibility to  
9 make sure that this kind of criminal conduct ends.

10 That being said, it's interesting how the Congress  
11 and the sentencing guidelines have conflated trafficking from  
12 receipt.

13 In other words, it seems to me that there should be  
14 more of a penalty for someone that is purveying pornography  
15 than there is for someone that simply receives it or someone  
16 that possesses it.

17 This law allows the court, I believe, the  
18 opportunity to examine individuals to find out whether they  
19 are simply possessing child pornography and whether those  
20 individuals are sexual predators or not.

21 If they are sexual predators, then the court I think  
22 has an obligation to sentence them at the higher end of the  
23 guidelines.

24 The question is, what guidelines are supposed to be  
25 applied?

1           And Congress mandated the sentencing commission to  
2       change the way courts reviewed these cases and basically in  
3       my opinion conflated those individuals that are simply  
4       possessing child pornography with those individuals who are  
5       distributing it or are in the business of distributing it.

6           Because of the way the guidelines change, if I took  
7       the old guidelines for simple possession for Mr. Baird and  
8       did a guidelines calculation, that calculation would put him  
9       in about two years in prison as opposed to the four years  
10      that he has under the current calculation.

11          I had him evaluated to be sure that he was not a  
12      sexual predator and that he was a person that was simply  
13      possessing fundamentally as opposed to someone who was  
14      fundamentally in the distribution business.

15          So it seems to me that for that reason the  
16      guidelines are somewhat inapplicable, much the way the  
17      court's analysis recently in Kimbrough, and to a certain  
18      extent Gall, and I'll elaborate in a written opinion.

19          As far as the departure is concerned, it seems to me  
20      that Mr. Baird is somewhat outside the heartland in this case  
21      because he did attempt to extricate himself from this conduct  
22      by no longer using a computer to either receive or distribute  
23      and that it did happen a number of years before he was  
24      charged, and there didn't appear to be any continuing  
25      activity after he had ended his conduct.

1 I think I have to take into account the fact that he  
2 has had an exemplary life otherwise.

3 But I don't think that the motion for downward  
4 departure is as substantial an issue as the sentencing  
5 guidelines.

6 It doesn't appear that Mr. Baird has any likelihood  
7 of offending that is substantial.

8 Given the conduct here, which is basically  
9 possession as opposed to distribution, it seems to me that a  
10 sentence closer to two years is appropriate and not the four  
11 years that is suggested by the guidelines.

12 So for that reason the defendant is committed to the  
13 custody of the United States Bureau of Prisons for 24 months.

14 I'll recommend that he be incarcerated in a federal  
15 facility as close to Omaha, Nebraska, as possible, and I'll  
16 suggest FPC Yankton.

17 MR. SCHAEFER: Judge, can I interrupt? His family  
18 all lives in California. He was planning on probably living  
19 there after this is over and there is a federal institution  
20 called Atwater in California.

21 THE COURT: Where is his family living?

22 MR. SCHAEFER: Right outside of Fresno.

23 THE COURT: I will recommend as close to his family  
24 in Fresno, California, and I'll suggest the institution at  
25 Atwater, and he's to be given credit for time served.

1 I'll allow him to self-surrender and the marshals  
2 and probation officer will be in touch.

3 I will put him on a period of supervised release of  
4 five years, subject to the mandatory conditions.

5 The standard conditions are also imposed, and then  
6 the following special conditions.

7 Mr. Baird is to cooperate in the collection of a DNA  
8 sample as required by law.

9 He's to submit his person, residence, office or  
10 vehicle to search conducted by the probation officer at any  
11 time.

12 Failure to submit to the search may be grounds for  
13 revocation.

14 The defendant will warn any other residents that his  
15 premises are subject to search.

16 He is to have no contact or reside with children  
17 under the ages of 18, including his own children, unless  
18 approved in advance in writing by the probation officer in  
19 consultation with treatment providers.

20 He shall report all incidental contact with children  
21 to the probation officer and the treatment provider.

22 He's not to be employed or participate in any  
23 volunteer activities that involves contact with children  
24 under the age of 18, except under circumstances approved in  
25 advance in writing by the probation office.

1           He shall not access, view or possess any  
2           pornographic, sexually oriented or sexually stimulating  
3           materials.

4           And he shall not patronize places where such  
5           material or entertainment is available, and that would  
6           include auditory, telephonic, electronic media, or computer  
7           programs or services.

8           He's to have his residence and living situation  
9           approved in advance by the probation officer.

10          He shall sign releases of information as to allow  
11          all involved in his assessment, treatment and behavioral  
12          monitoring to communicate in order to share documentation  
13          with each other concerning his treatment.

14          He is to register as a sex offender in accordance  
15          with state and federal law and not move to a different  
16          address without the prior approval of the probation office.

17          He's to successfully complete any sex offender  
18          diagnostic evaluation, treatment or counseling program as  
19          directed by the probation office.

20          Reports pertaining to such assessments, treatments,  
21          shall be provided to the probation officer and he shall pay  
22          for them based on his ability to pay.

23          He's to participate in the victim awareness program  
24          as directed by the probation officer and pay for that based  
25          on his ability to pay.

1           He shall submit to quarterly monitoring of all  
2       electronic medias as directed by the probation officer with  
3       or without the cooperation of law enforcement.

4           He's to provide the probation office with requested  
5       financial information.

6           The drug testing requirement of 18, United States  
7       Code, Section 3583(d) is suspended until further order of the  
8       court because it appears that Mr. Baird is a low substance  
9       abuse risk.

10          He's to report to the supervision unit of the United  
11       States probation office here in Omaha within seventy-two  
12       hours of his release from confinement.

13          That designation can change, but you need to make  
14       arrangements through the court or the Bureau of Prisons to  
15       get your place of reporting changed if you intend to live in  
16       California.

17          A special assessment of one hundred dollars is  
18       imposed. No fine or court costs are imposed and the interest  
19       requirement is waived.

20          Is there any legal reason why the court should not  
21       impose the sentence previously stated? Mr. Norris?

22               MR. NORRIS: No, Your Honor.

23               THE COURT: Mr. Schaefer?

24               MR. SCHAEFER: No, Judge.

25               THE COURT: The sentence previously stated shall be

1 and hereby is imposed on the defendant, Eric Baird.

2 Mr. Baird, you have the right to appeal your  
3 sentence and your conviction but you must file it within ten  
4 days of when I sign the order.

5 If you want to appeal the case, I would suggest you  
6 talk to Mr. Schaefer.

7 If you cannot afford the cost of a lawyer or the  
8 cost appeal, he'll put together the necessary paperwork and  
9 if you qualify you don't have to pay for your lawyer or the  
10 cost of the appeal.

11 Mr. Norris, is there anything further?

12 MR. NORRIS: Just his release, Your Honor, and I  
13 have no objection to his self-reporting.

14 THE COURT: Mr. Schaefer?

15 MR. SCHAEFER: No.

16 THE COURT: Mr. Baird, the probation office and the  
17 marshal's office will be in touch with you as to where to  
18 report. We are adjourned.

19 (10:30 a.m. - End of Proceedings)

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C-E-R-T-I-F-I-C-A-T-E

I, Allan G. Kuhlman, do hereby certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Dated this 14th day of December, 2010.

s/Allan G. Kuhlman  
Allan G. Kuhlman